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IN THE SUPREME COURT OF THE UNITED STATES

MARIO CLAIBORNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 439 F.3d 479.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2006. A petition for rehearing was denied on April 27, 2006 (Pet. App. 5). The petition for a writ of certiorari was filed on July 26, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Missouri, petitioner was convicted of distribution of cocaine base, in violation of 21 U.S.C. 841(a)(1), and possession of more than five grams of cocaine base, in violation of 21 U.S.C. 844(a). He was sentenced to 15 months of imprisonment. The court of appeals vacated the sentence and remanded for resentencing.

1. On May 14, 2003, police detectives patrolling an area in St. Louis, Missouri, observed drug trafficking and decided to make a controlled purchase. An undercover detective drove past petitioner, who was standing on the sidewalk, and petitioner flagged him down. The detective stopped the car and told petitioner that he wanted $20 worth of crack cocaine. Petitioner got in the car and handed the detective a plastic bag containing what appeared to be crack. In return, the detective gave petitioner a marked $20 bill. When petitioner left the car, the police arrested him and seized the marked bill from his pocket. A laboratory analysis revealed that the substance in the plastic bag was .23 grams of cocaine base. Gov't C.A. Br. 3-4; Pet. App. 1.

On November 2, 2003, police officers responded to complaints of drug sales at a house at 3455 Oregon. When they arrived, they saw petitioner and another person engaged in what appeared to be a drug transaction on the front porch of the house. When petitioner

and the other man saw the officers, petitioner threw down a plastic bag containing what appeared to be crack cocaine, entered the house with the other man, and locked the door. The two men then left the house through the rear, ran back toward the front, and entered a nearby house, at 3429 Oregon, without the permission of the occupants, a woman and her grandchildren. Petitioner then ran out the back of that house and escaped. A short time later, the officers arrested petitioner at his own house, a few blocks away. A laboratory analysis of the substance petitioner had discarded revealed that it was 5.03 grams of cocaine base. Gov't C.A. Br. 4-6; Pet. App. 1-2.

2. Petitioner was charged in a superseding indictment with distributing cocaine base in May 2003 and possessing more than five grams of cocaine base in November 2003, in violation of 21 U.S.C. 841(a)(1) and 844(a). He pleaded guilty to both charges. Gov't C.A. Br. 1, 7. Pet. App. 2.

In calculating petitioner's offense level, the Probation Office began with a base offense level of 26 because the amount of crack exceeded five grams; added two levels because petitioner recklessly created a substantial risk of death or serious bodily injury when he fled into the house at 3429 Oregon; and subtracted three levels for acceptance of responsibility. That calculation resulted in a total offense level of 25, which, when combined with a criminal history category of I, yielded a Sentencing Guidelines

range of 57 to 71 months of imprisonment. Because the offense involved more than five grams of cocaine base, however, petitioner was subject to a statutory minimum prison term of five years. The effective Guidelines range was therefore 60 to 71 months. PSR ¶¶ 19-28, 33, 48; Gov't C.A. Br. 8; see 21 U.S.C. 844(a); Sentencing Guidelines §§ 2D1.1(a)(3) and (c)(7), 3C1.2, 3E1.1, 5G1.1 (c)(2) (2004).

3. Before the district court sentenced petitioner, this Court decided United States v. Booker, 543 U.S. 220 (2005). Booker held that the Sixth Amendment right to a jury trial is violated when a defendant's sentence is increased based on judicial factfinding under mandatory federal Sentencing Guidelines. As a remedy for that constitutional infirmity, the Court severed two provisions of the Sentencing Reform Act (SRA). 543 U.S. at 258-265. The first was 18 U.S.C. 3553(b)(1), which had required courts to impose a Guidelines sentence. "So modified, the [SRA] makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well." 543 U.S. at 245 (citations omitted). The Court also severed the appellate-review standards in 18 U.S.C. 3742(e), which had served to reinforce the mandatory character of the Guidelines. The Court replaced that provision with a general standard of review for "unreasonableness," under which courts of appeals determine

"whether the sentence 'is unreasonable' with regard to [18 U.S.C.] § 3553(a)." 543 U.S. at 261.'

Section 3553(a) provides as follows:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed --
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for --
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines --
>
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code * * * [;]
>
> * * * *
>
> * * * *

4. At sentencing, the district court declined to apply an enhancement for reckless endangerment and found that petitioner satisfied the "safety valve" criteria of 18 U.S.C. 3553(f) and Sentencing Guidelines § 5C1.2. As a consequence, petitioner's offense level was 21, his Guidelines range was 37 to 46 months, and he was not subject to a statutory minimum sentence. The district court imposed a sentence of 15 months of imprisonment. The court explained that a sentence at the low end of the Guidelines range -- 37 months -- would be "excessive," because of petitioner's lack of criminal history, his youth, the small quantity of drugs involved in the crimes of conviction, and the court's belief that petitioner was not likely to commit similar crimes in the future. Gov't C.A. Br. 8-9; Pet. App. 2.

5. On the government's appeal, the court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. 1-4.

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(5) any pertinent policy statement --

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code * * * [;]

* * * *

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

The court of appeals noted that, although the Sentencing Guidelines are no longer mandatory, district courts are still required to take them into account, together with the other sentencing factors in 18 U.S.C. 3553(a). Pet. App. 2. The court then explained that, when, as in this case, the district court has correctly calculated the advisory Guidelines range, the court of appeals will "review the resulting sentence for reasonableness, a standard akin to * * * traditional review for abuse of discretion." Ibid. The court observed that a sentence within the advisory Guidelines range "is presumed reasonable," because the "Guidelines were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study." Id. at 3. The court added, however, that a sentence outside the advisory Guidelines range will be found reasonable "so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. § 3553(a)," with a proportionately more compelling justification required as the extent of the variance from the Guidelines range increases. Ibid. (quoting United States v. Johnson, 427 F.3d 423, 426 (7th Cir. 2005)). In particular, the court said, "[a]n extraordinary reduction must be supported by extraordinary circumstances." Ibid. (quoting United States v. Dalton, 404 F.3d 1029, 1033 (8th Cir. 2005)).

Applying those principles, the court of appeals held that the sentence imposed in this case was unreasonable. Pet. App. 3-4. The court reasoned that the 15-month sentence reflected a "sixty percent downward variance" from the bottom of the 37-to-46-month advisory Guidelines range, that 60 percent was "an extraordinary variance," and that it was "not supported by comparably extraordinary circumstances." Id. at 3. In finding a lack of extraordinary circumstances, the court explained that petitioner's lack of criminal history "was taken into account when the safety valve eliminated an otherwise applicable mandatory minimum sentence"; that the small quantity of drugs "was taken into account in determining his guidelines range"; that petitioner "committed a second serious drug offense six months after his first arrest"; and that it was a "fair inference" that he "distributed additional quantities of cocaine during the six months between the two occasions interdicted by the police." Id. at 3-4.

ARGUMENT

Petitioner contends (Pet. 6-24) that the standards applied by the court of appeals in reviewing his sentence for unreasonableness are inconsistent with United States v. Booker, 543 U.S. 220 (2005). Petitioner is mistaken, and further review is unwarranted.

1. The court of appeals vacated petitioner's sentence and remanded the case to the district court for resentencing. The decision is therefore interlocutory, a posture that "of itself

alone furnishe[s] sufficient ground" for the denial of certiorari. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); accord Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967); American Constr. Co. v. Jacksonville Ry., 148 U.S. 372, 384 (1893); Virginia Military Inst. v. United States, 508 U.S. 946 (1993) (Scalia, J., concurring). This Court ordinarily denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of the criminal proceedings. See Robert L. Stern et al., Supreme Court Practice § 4.18, at 258 n.59 (8th ed. 2002). The practice promotes judicial efficiency by ensuring that all of the defendant's claims can be consolidated and presented in a single petition to the Court. See ibid. While not an invariable rule, the practice makes particular sense in this case, where petitioner challenges the sentencing procedures employed by the court of appeals and his sentence is not yet final.

2. Petitioner's challenge to the court of appeals' standards for reviewing sentences would not warrant review by this Court even if the decision below were not interlocutory.

a. The principle on which the court of appeals relied in holding that petitioner's sentence was unreasonable is that "[a]n extraordinary reduction must be supported by extraordinary circumstances." Pet. App. 3 (quoting United States v. Dalton, 404 F.3d 1029, 1033 (8th Cir. 2005)). That principle is fully

consistent with Booker. The Court in Booker observed that, after its decision, the Sentencing Commission will "remain[] in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly." 543 U.S. at 264. The Court also pointed out that "[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing," and that "[t]he courts of appeals [will] review [those] sentencing decisions for reasonableness." Ibid. Accordingly, the Court explained, the Guidelines will "promote uniformity in the sentencing process" and "help[] to avoid excessive sentencing disparities." Id. at 263-264. Given Booker's recognition of the important role of the Guidelines in fostering uniformity and the function of appellate review in "tend[ing] to iron out sentencing differences," id. at 263, it is entirely in keeping with Booker for appellate courts, in conducting review for unreasonableness, to require a compelling justification for a sentence that is far outside the advisory Guidelines range.

That principle has been uniformly applied by the courts of appeals since Booker. As Judge Sutton recently explained, "every court of appeals to consider the question * * * take[s] the view that when the district court independently chooses to deviate from the advisory guidelines range (whether above or below it), [the court of appeals] appl[ies] a form of proportionality review: 'the

farther the judge's sentence departs from the guidelines sentence . . . the more compelling the justification based on factors in section 3553(a)' must be." United States v. Davis, 458 F.3d 491, 496 (6th Cir. 2006) (quoting United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005) (Posner, J.), and citing cases from First, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits). Petitioner contends (Pet. 7-8, 23) that the decision below conflicts with United States v. Williams, 435 F.3d 1350 (2006), in which the Eleventh Circuit affirmed a sentence for a crack offense that was more than 50 percent below the bottom of the advisory Guidelines range. But since the Eleventh Circuit has endorsed the principle that "[a]n extraordinary reduction must be supported by extraordinary circumstances," United States v. Crisp, 454 F.3d 1285, 1291 (11th Cir. 2006) (quoting Dalton, 404 F.3d at 1033); accord, e.g., United States v. Martin, 455 F.3d 1227, 1236-1237 (11th Cir. 2006); United States v. McVay, 447 F.3d 1348, 1357 (11th Cir. 2006), there is no disagreement between the Eleventh Circuit and the court below with respect to the rule applied in this case.

b. Petitioner also contends (Pet. 11-14, 22-24) that according a presumption of reasonableness to a sentence within the Guidelines range makes the Guidelines effectively mandatory, in violation of Booker, and that there is a circuit conflict on whether a sentence within the advisory Guidelines range is entitled to a presumption of reasonableness on appellate review. That

question is not presented in this case. Although the court of appeals mentioned the presumption of reasonableness (Pet. App. 3), petitioner's sentence was not within the Guidelines range and thus the court of appeals did not apply that presumption. In any event, as the government has explained in briefs in opposition to other petitions that raise the claim, according a Guidelines sentence a presumption of reasonableness is consistent with Booker and does not make the Guidelines effectively mandatory, and it is not clear that reasonableness review is materially different in circuits that have adopted the presumption than in those that have not. See, e.g., Gov't Br. in Opp. at 7-14, Guzman-Balbuena v. United States, No. 05-10634, 2006 WL 2089475 (filed June 29, 2006); Gov't Br. in Opp. at 13-19, Artis v. United States, No. 05-10431, 2006 WL 1733084 (filed June 19, 2006).

c. Petitioner also contends (Pet. 15-17) that the 15-month sentence imposed on him was not unreasonable because Congress has prescribed harsher punishment for offenses involving crack cocaine than for offenses involving powder cocaine and the Sentencing Commission has expressed disagreement with that policy. That question is also not presented in this case, because the district court did not rely on that consideration in imposing sentence, see Sent. Tr. 21-25, and the court of appeals therefore had no occasion to address the permissibility of doing so. In any event, the courts of appeals that have addressed that question have uniformly

concluded that categorical disagreement with the congressionally prescribed crack-powder ratio is not a permissible basis for a reduced sentence. See United States v. Castillo, 460 F.3d 337, 353 (2d Cir. 2006) (agreeing with First, Fourth, and Eleventh Circuits).

d. Petitioner also contends (Pet. 17-24) that the court of appeals violated Booker by applying a standard of review that was effectively de novo. That is not correct. In reviewing petitioner's sentence for unreasonableness, the court of appeals explicitly stated that it was applying "a standard akin to * * * traditional review for abuse of discretion." Pet. App. 2. Contrary to petitioner's claim, moreover, that standard is entirely consistent with "the deferential abuse of discretion standard used to assess the 'reasonableness' of non-guidelines sentences prior to 2003," when Congress amended the SRA to require de novo review of departures. Pet. 20 (citing Koon v. United States, 518 U.S. 81, 98 (1996)). Under the pre-2003 standard, a sentence was "reasonable" if "the reasons given by the district court" were "sufficient to justify the magnitude of the departure," Williams v. United States, 503 U.S. 193, 204 (1992), and it logically follows from that general principle that a reduction (or increase) of "extraordinary" magnitude requires "extraordinary" reasons, Pet. App. 3. Petitioner is equally mistaken in his suggestion (Pet. 7, 20-21) that it is inconsistent with an abuse-of-discretion standard to

say, as the Eighth Circuit has, that there is a "limited range of choice dictated by the facts of [a particular] case." United States v. Haack, 403 F.3d 997, 1004, cert. denied, 126 S. Ct. 276 (2005). If there were an unlimited range of choice in each case, the district court's discretion in imposing sentence would be unreviewable, not reviewable for an abuse. Cf. Booker, 543 U.S. at 263 (noting that "appellate review[] would tend to iron out sentencing differences"). Finally, to the extent that petitioner is arguing that the court of appeals misapplied the abuse-of-discretion standard in holding that the sentence in this case was unreasonable, see Pet. 20, that contention also does not warrant review, because "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law," Sup. Ct. R. 10.

3. This Court has granted certiorari in Cunningham v. California, No. 05-6551 (cert. granted Feb. 21, 2006), to decide whether California's Determinate Sentencing Law violates the Sixth and Fourteenth Amendments by permitting sentencing judges to impose enhanced sentences based on facts not found by the jury or admitted by the defendant. The petition in this case need not be held pending the disposition of Cunningham, however, because the federal Guidelines system is unlike the California sentencing scheme.

Under California law, the statute defining a criminal offense typically specifies three possible terms of imprisonment: a lower

term, a middle term, and an upper term. See People v. Black, 113 P.3d 534, 538 (Cal. 2005), petition for cert. pending, No. 05-6793 (filed Sept. 28, 2005). California's Determinate Sentencing Law provides that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime," Cal. Penal Code § 1170(b), and a rule issued under the law provides that a court may impose the upper term "only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation," Cal. R. Ct. 4.420(b). Aggravating and mitigating circumstances may be established by a preponderance of the evidence, ibid., and, in determining the "relevant facts," the court may consider "the record in the case, the probation officer's report, other reports * * * and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, * * * and any further evidence introduced at the sentencing hearing," Cal. Penal Code § 1170(b).

Unlike the California law, which is "worded in mandatory language," Black, 113 P.3d at 544, the SRA, as modified by Booker, is not a determinate sentencing law. The federal Guidelines are "effectively advisory," Booker, 543 U.S. at 245, and federal sentences are ultimately based on the factors in 18 U.S.C. 3553(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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